**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 10, SUBREGION 11**

**ELON UNIVERSITY**

**Employer**

**and** **Case 10–RC–231745**

**SEIU WORKERS UNITED SOUTHERN REGION**

**Petitioner**

## DECISION AND CERTIFICATION OF REPRESENTATIVE

This case arises from the Employer's exceptions to a Hearing Officer's Report on Objections in which the Hearing Officer recommended that I overrule all of the Employer's Objections to a Board-conducted representation election and certify the Union as the collective-bargaining representative of the unit. For the reasons set forth below, I find that the Employer's exceptions lack merit and that the Hearing Officer was correct in recommending that I overrule the Employer's Objections. Accordingly, I shall overrule the Objections and certify the Petitioner as the exclusive collective-bargaining representative of the unit.

***Procedural History***

Pursuant to the Acting Regional Director's Decision and Direction of Election, a Board agent conducted a mail-ballot election in this case that commenced on March 12, 2019, in the following voting unit:

> **Including:** All limited term, visiting, and adjunct faculty employees at Elon University teaching at least one credit-bearing undergraduate course in the Employer's College of Arts and Sciences, School of Communications, School of Education, or Martha & Spencer Love School of Business.
>
> **Excluding:** All other employees, all tenured and tenure-track faculty, all continuing track faculty, all lecturing track faculty, all employees teaching online courses only, staff with faculty rank, all administrators (including those with teaching assignments), managers, and supervisors as defined by the Act.

The Tally of Ballots shows that of approximately 283 eligible voters, 112 votes were cast for, and 68 votes were cast against the Petitioner, with one void ballot and 20 non-determinative challenged ballots. Thus, a majority of eligible voters voted for representation by the Petitioner.

On March 19, 2019, the Employer timely filed Objections to Election alleging conduct affecting the results of the election and requested that the election results be set aside and for the Regional Director to dismiss the Petition, or in the alternative, to direct a new election. Duly designated Hearing Officer Ashley Banks conducted a hearing on the Employer's Objections to Election on April 2, 2019. On May 13, 2019, the Hearing Officer issued her Report on Objections in which she recommended overruling the Employer's Objections in their entirety. On May 28, 2019, the Employer filed exceptions to the Hearing Officer's Report. On June 7, 2019, the Petitioner filed a brief in opposition to the Employer's exceptions.

In reaching the conclusions in this decision, I have carefully reviewed the rulings in the Hearing Officer's Report on Objections, the Employer's exceptions to the Report, and the Petitioner's brief.

***Employer's Objections Considered by the Hearing Officer***

As set forth in the Hearing Officer's Report on Objections, she considered the Employer's Objection 1, and Objections 3 through 6.[1] These Objections allege:

> **OBJECTION 1:** Both before and during the critical period, through the actions of its agents and with objectionable conduct, the Petitioner coerced and intimidated faculty to sign union authorization cards and support the union, by posing as students to engage faculty members in purportedly work-related "student-teacher" discussions. During these ambush encounters, agents of the Petitioner falsely portrayed their pro-union views as those of a student, and trapped faculty members into coercive conversations based on the faculty members' obligation to engage with students on academic matters, thus interfering with employee free choice.

[1] The Employer withdrew Objection 2 during the hearing on April 2, 2019.

**OBJECTION 3:** Both before and during the critical period, through the actions of its agents and with objectionable conduct, the Petitioner coerced and intimidated employees to sign union authorization cards and support the union, by aggressively stalking faculty members and refusing faculty members' request to be left alone. The coercive and intimidating stalking occurred on campus and off-campus, causing faculty members to be fearful and thus interfering with employee free choice.

**OBJECTION 4:** Both before and during the critical period, through the actions of its agents and with objectionable conduct, the Petitioner illegally coerced and intimidated employees to sign union authorization cards and support the union, said agents being tenured and tenure-track faculty who are "managerial employees" and thus are considered to be Section 2(11) supervisors under the Act. The coercion and intimidation occurred during both working time and non-working time, and with the tenured and tenure-track faculty openly campaigning for the union, distributing pro-union literature, allowing their signatures to be used by the union for publicity purposes, and otherwise attempting to persuade employees to support the union and to use their positions of managerial and Section 2(11) authority to interfere with employee free choice.

**OBJECTION 5:** Both before and during the critical period, members of the Academic Council, acting in support and favor of Petitioner, violated laboratory conditions and thus committed objectionable conduct by openly campaigning with employees for the SEIU, including but not limited to pressuring employees to sign union authorization cards, distributing pro-union literature, allowing their signatures to be used in pro-union literature by the SEIU for campaign publicity purposes, and otherwise attempting to persuade employees to support Petitioner and thus to use their positions of managerial authority to interfere with employee free choice.

**OBJECTION 6:** During the critical period, agents of the SEIU and/or supporters of the SEIU distributed electioneering material indicating that the National Labor Relations Board election process was biased towards the SEIU by promulgating an email stating: "Can we count on you to vote yes for our union? If so, fill out this form and we'll make sure your ballot gets to you," which contained a link to a website maintained by the SEIU. Such electioneering undermined the validity of the official NLRB election, resulted in a low voter participation, and constituted objectionable conduct in violation of Board-mandated laboratory conditions.

***Employer's Exceptions to the Hearing Officer's Report on Objections***

The Employer, Elon University, filed 22 exceptions to the Hearing Officer's Report. In reviewing the Hearing Officer's recommendation to overrule Employer Objections 1 and 3, I have considered each of the Employer's corresponding exceptions, any interrelated exceptions, and all supporting arguments. I have done the same for Objections 4 and 5, and 6.

As the party challenging the outcome of the election, the Employer bears "the burden of showing by specific evidence that the alleged improprieties occurred . . . [and] to prove every aspect of its prima facie case." *United Sanitation Services*, 272 NLRB 119, 120 (1984). The Employer failed to carry that burden. [2]

In the discussion below, I have not endeavored to respond to every contention the Employer made, nor have I addressed every factual circumstance. For those I do not discuss below, I have carefully considered the evidence, the Hearing Officer's findings, and concluded that the Employer's exceptions are meritless, and the Hearing Officer adequately disposed of the Employer's contentions and that her conclusions require no comment on my part.

The Employer's Objections and subsequent exceptions are best analogized to a house of cards on which every level of the house is founded on a false or faulty assumption and thus pressing any level of the house would have been enough to topple the house. In some cases, the Hearing Officer, and I in my review of her decision, have pushed against all of the floors of the house, repeatedly employing the phrase, expressly or implicitly, "assuming arguendo." In others, neither of us found it necessary to push against all of the levels. Others might have chosen other floors, or assumptions, to probe, but regardless of those choices, the result is always the same: The Employer's Objections and exceptions to the Hearing Officer's decision lack merit.

***Employer's Exceptions Regarding Objections 1 And 3***

The Employer excepts to the Hearing Officer's recommendation to overrule Objections 1 and 3 and contends that the Petitioner, SEIU Workers United Southern Region, engaged in conduct

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[2] As discussed below, the Employer has not excepted to any factual determinations the Hearing Officer made. I have nevertheless considered all of the Hearing Officer's findings of fact and, except as described below, I have found them to be fully supported by the record evidence.

that interfered with employee free choice.[3] For the reasons set forth in the Hearing Officer's Report on Objections, and as amplified below, I agree with her recommendation to overrule Objections 1 and 3.

In its Objection 1, the Employer contends that the Petitioner's organizers posed as students in "ambush encounters" that "trapped faculty members into coercive conversations." In Objection 3, the Employer contends that the organizers stalked faculty members on and off campus to "coerce[] and intimidate[]" them to support the Petitioner. Of the 283 faculty members eligible to vote in the election, the Employer presented one — again, **one** — eligible faculty member, and two ineligible faculty members, to establish its contention that the Petitioner stalked and ambushed eligible voters to coerce them to support the Petitioner in the representation election.

Based on the evidence presented, the Hearing Officer properly concluded that Brandon Booker, the only eligible faculty member who testified to face-to-face interactions with organizers for the Petitioner, was neither ambushed, trapped, nor stalked, and that the Petitioner did not coerce him in any way. As the Hearing Officer patiently explained, there is no evidence that any representative of the Petitioner posed as students and all of the organizers' interactions with Booker were consensual. Booker also knew at all relevant times that the individuals he spoke with were organizers for the Petitioner or, in one instance, a member of the Employer's faculty in the voting unit. During Booker's first contact with a representative of the Petitioner, which took place outside of the critical period,[4] Booker told Organizer Madeline Lewis (without inquiring as

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[3] Exceptions 1 through 11.

[4] The Hearing Officer correctly concluded that generally, an election may be set aside only for misconduct that occurred during the critical period as defined in *Ideal Electric Co*., 134 NLRB 1275 (1961); that is, the period from when the petitioner filed its petition through the Board-conducted election. Here, the critical period commenced on November 29, 2019. The Hearing Officer also correctly concluded that that she could consider pre-petition conduct only to the extent

to who she was at the time) that he was in a hurry and agreed to meet with her at a later scheduled time. At the beginning of their scheduled meeting later in the day, Lewis introduced herself as an organizer for the Petitioner and Booker went ahead with the meeting, talking about Booker's schedule and how long he had been teaching. In each of Booker's subsequent interactions with an organizer or, in one case, an organizer and a member of the voting unit (including those interactions within the critical period), the organizer introduced him or herself, and identified his or her affiliation with the Petitioner at the outset of their first of their encounters. When Booker told Organizer Jake Stanley, "man . . . you people are like stalkers," Stanley apologized to Booker but Booker nevertheless invited Stanley to come up to Booker's office. As the Hearing Officer found, the organizers and fellow faculty member who interacted with Booker were polite and respectful and did not make any threats during any of those interactions. Although Booker testified that he was "irritated" by his last encounter with an organizer for the Petitioner, he agreed to meet with the organizer anyway because, "honestly, I just wanted to see what information [the Petitioner] had." The organizers, even during unannounced visits to Booker, did not interfere with Booker's duties or his ability to meet with students during his office hours. Booker never asked the organizers to stop coming to his office and never asked an organizer to leave.[5] Booker had no difficulty in declining to attend a union-related function to which one of the organizers invited him. He also had no difficulty in declining to complete a postcard for additional information about the Petitioner. Booker tore the card into pieces and threw it away.

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that the prior conduct lends meaning and dimension to conduct that took place within the critical period. *Stevenson Equipment Co.*, 174 NLRB 865, 867 fn. 1 (1969). The Hearing Officer also correctly considered the Employer's contention that the Petitioner coerced employees to sign union-authorization cards consistent with the Board's decision in *Harborside Healthcare*, 343 NLRB 906 (2004).

[5] Accordingly, the Employer's contention in Objection 3 that Petitioner's organizers "refus[ed] faculty members' request to be left alone," is wholly unsupported by the evidence.

The Employer also offered the testimony of two members of its faculty — College of Arts and Sciences Music Department Lecturer Fred Johnson and College of Arts and Sciences World Languages and Cultures Department Senior Lecturer April Post — neither of whom were eligible to vote in the election. While finding that, as with Booker, there was no evidence that organizers for the Petitioner posed as students to gain access to Johnson or Post, and that the Petitioner did not trap, ambush, stalk, or coerce these individuals, the Hearing Officer properly considered their testimony as relevant only to the extent that the Petitioner's conduct affected eligible voters. The Hearing Officer correctly found that Johnson spoke to an individual, Corey Harwood, who may or may not have been an eligible voter, in September or October 2018, about the Petitioner's organizing effort. Johnson and Harwood agreed with one another that the organizers were annoying. Harwood also said he "felt like he was being stalked" and Johnson agreed that the organizers were "persistent."

On December 5, 2018, Post emailed the foreign-language faculty and staff about the campaign and the benefits they currently enjoyed and advised them that she was not supporting the Petitioner. Post, in that email, accused the Petitioner's organizers of conduct "border[ing] on stalking" because they wait to talk to faculty after their classes or during their office hours and had conversations that lasted from 30 minutes to an hour. About 10 eligible voters worked in her department and therefore may have seen that email.

On December 7, 2018, Johnson sent an email to the college's listserv for all faculty and staff, the so-called "FacStaff" listserv. Johnson said in his email that a young woman who turned out to be an organizer had "posed as a student wanting to talk with me about my classes" and that the individual would not answer whether she was working with Petitioner. Although the Hearing Officer correctly found, consistent with the evidence, that the conduct of which Johnson

complained in her email did not take place, [6] the recipients would not have known that. Unlike the Hearing Officer, I would find that at least some of the faculty members in the voting unit saw the email given its transmittal to all faculty and staff. However, only one individual, a member of the voting unit, Adjunct Professor and Academic Council member Billy Summers, replied to the email. Summers thanked Johnson for her email and stated, "I agree with you about the [Petitioner's] tactics. I refer to the female you are talking about as 'my stalker.'"

Although eligible voters may have read Post's and Johnson's emails and Summers' response to Johnson, any voters who saw the emails had the months between the email on December 7, 2018 until the commencement of the mail-ballot election on March 12, 2019, in order to determine for themselves whether they approved of the Petitioner's organizing methods and whether the organizers were "stalkers." The Hearing Officer also correctly concluded that there were no other alleged irregularities of this type after the December emails. The Hearing Officer properly found that, given the time that elapsed between the email and the election, and other factors, Booker's interactions with the Petitioner, and the information that Post and Johnson provided in their emails to eligible voters, did not interfere with employees' freedom of choice.

In its exceptions, the Employer contends that the Hearing Officer failed to "place any evidentiary weight on the improper activity of the Petitioners' organizers," "justifie[d] the bad

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[6] The Hearing Officer found that, during Johnson's interaction with the organizer in the meeting that was the subject of her email, the organizer did not purport to be a student, though Johnson may have assumed she was. The Hearing Officer also properly found that the organizer did not refuse to identify her intentions. The Hearing Officer also correctly found that organizers for the Petitioner did not objectively "stalk" Johnson or any other member of the faculty. The Hearing Officer found that the individual who was the subject of Johnson's email, Organizer Lewis, told Johnson early in their conversation, that she was "part of a group here that works with faculty and they expressed some concerns about the department here." The two talked about working conditions for the next hour until Johnson said, "I think we're done." As with all faculty interactions with organizers for the Petitioner, the organizer was polite and did not coerce Johnson in any way.

behavior of the Petitioner's organizers based on the difficulty unions face in communicating their message to prospective union members," and erroneously concluded that "the on-campus and off-campus 'stalking' and other coercive conduct" did not "intimidate employees into signing union authorization cards or supporting the union."

In its exceptions, the Employer did not contend that the Hearing Officer failed to consider any relevant evidence. The Employer also did not contend or explain how the Hearing Officer erred in considering the evidence on which she relied. It did not explicitly contend that the Hearing Officer erred in finding that the contacts between voter Booker and the Petitioner's organizers were consensual, cordial, respectful, and free of coercion. It also did not explicitly contend that the Hearing Officer erred in finding that the organizers did not enter or campaign in classrooms, offices, or buildings that were locked or restricted to faculty staff, or students, and that all of the Petitioner's campaigning took place in places within the university open to members of the public. The Employer instead asks that I set aside the Hearing Officer's recommendations based solely on its bald assertion that the Petitioner engaged in "improper activity" and "bad" and "coercive conduct," that "intimidate[d] employees into signing union authorization cards or supporting the union." Without *any* evidence of this improper conduct, I respectfully decline to provide the Employer with what it requests and shall instead adopt the Hearing Officer's recommendation to overrule Objections 1 and 3.

***Employer's Exceptions Regarding Objections 4 and 5***

The Employer excepts to the Hearing Officer's recommendation to overrule Objections 4 and 5. In Objection 4, the Employer contends that faculty members — whom it maintains are managerial employees and "thus are considered to be Section 2(11) supervisors under the Act" —

"illegally coerced and intimidated employees to sign union authorization cards and support" the Petitioner. The Employer contends that tenured and tenure-track faculty[7] are agents of the Petitioner and openly campaigned for the Petitioner, distributed pro-union literature, allowed their signatures to be used by the Petitioner for publicity purposes, and used their supervisory and managerial authority to interfere with employee free choice. In Objection 5, the Employer contends that members of the Academic Council engaged in similar activities on behalf of the Petitioner.

As the Hearing Officer correctly found, Provost and Executive Vice President Steven House, the Employer's chief academic officer, said that there was, during the critical period, a "healthy and lively debate" on the FacStaff listserv, an email distribution list that includes all of the Employer's faculty and staff. Both prounion and anti-union tenured faculty participated in that "healthy and lively debate." Consistent with my conclusion above regarding the FacStaff listserv, I find that at least some eligible voters got these emails and were aware of this "healthy and lively debate."

On November 26, 2018, outside the critical period, the Petitioner sent to eligible voters Brandon Booker and Julie Swanner an email soliciting support for Petitioner among non-tenure track faculty.[8] It is not clear who, if anyone, also received this email. The email told the recipients, "The first step we can make together is to fill out a confidential union authorization card to demonstrate our commitment to voting for the formation of the union in order to make improvements at Elon for ourselves, our students, and our families. We hope you'll join us."

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[7] Tenured and tenure-track faculty are excluded from the unit.

[8] Non-tenure-track faculty, limited term, visiting, and adjunct faculty, in in the Employer's College of Arts and Sciences, School of Communications, School of Education, or Martha & Spencer Love School of Business, are eligible voters.

(Emphasis in original.) Adjunct Professor and Academic Council member Billy Summers, an eligible voter, was among the individuals whose name appeared at the bottom of the email. The email did not have an authorization card attached for the recipients to sign and the Petitioner did not directly solicit anyone in that email to sign a specific card. As the Hearing Officer observed, any response to the email would have gone to the Union, not to the individuals whose names appeared in the email. As to those names in the email, there is no evidence that the Petitioner sent the email to any employee supervised by any of the individuals whose names appeared there.

In late 2018 or early 2019, an unidentified sender sent an email to eligible voter Brandon Booker containing a letter of support for the Petitioner that tenured and tenure-track faculty signed and addressed to University President Connie Ledoux Book and Provost House. None of the faculty identified in the email as supporting the Petitioner supervised Booker.

On February 20, 2019, the Petitioner sent an email to eligible voter Julie Swanner with a copy of a letter that certain department chairs, Academic Council members, and tenured and tenure-track faculty signed and gave to the University President Book and Provost House supporting the Petitioner. As the Hearing Officer correctly found, there is no evidence that any other member of the voting unit received this email.[9] Swanner did not recognize any of the faculty identified in the email or letter and none of those individuals were Swanner's supervisor.

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[9] In so finding, I adopt the Hearing Officer's well-founded adverse inference from the Employer's failure to ask eligible voter Brandon Booker whether he received this email. Accordingly, the Hearing Officer rightly concluded that she could assume that, had the Employer asked Brooker, he would have testified that he did not receive this email.

While warranted, the adverse inference supports an existing truism: Booker did not testify that he received this email. It was the Employer's burden to establish all of the elements of the objectionable conduct. By asking only one of the two eligible voters who testified about this email, the Employer fell far short of establishing that a sufficient portion of the unit received the email and therefore would have been coerced had the email been coercive. Given that the email was not coercive and even two would not have established widespread dissemination among the unit, the

On February 22, 2019, eligible voter Billy Summers sent an email to an unofficial Employer-administered listserv labeled for adjunct faculty. Eligible voter Swanner received that email. Summers did not supervise Swanner. Unlike the official FacStaff listserv for all faculty and staff, I agree with the Hearing Officer that the Employer had a duty to establish who was on this listserv if it wished to establish widespread dissemination of the email to the voting unit.[10] While there was testimony that the FacStaff listserv went to all faculty and staff, that is not the case with the unofficial adjunct listserv. Neither Swanner nor Provost House could identify the recipients of this listserv. Again, this is *the Employer's* listserv. The email from Summers encouraged eligible voters to vote and educated them on how to fill out a mail ballot. It stated, "DO NOT PUT ANY MARKS ON THE BALLOT EXCEPT FOR THE X IN THE APPROPRIATE BOX (that would be in the "YES" box!)." Summers also voiced his intention to vote yes in the mail ballot election and his reasons for doing so. Although a member of the Academic Council, Summers was, as the Hearing Officer correctly found, a "peer" of the eligible voters in the unit. Summers is a part-time member of the faculty and included in the voting unit. Given that the email came through on an employer-established listserv (albeit an "unofficial" one) and came from Summers, it was clear that the email was not from the National Labor Relations Board and was instead campaign material from Summers.

In her decision, the Hearing Officer declined to determine the managerial status of the Employer's tenured and tenure-track faculty, including members of the Academic Council and

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determination is irrelevant to the ultimate conclusion anyway. There are multiple levels of evidentiary failure on the Employer's part and therefore multiple ways in which to determine that the Employer's Objections and exceptions lack merit.

[10] Having failed to establish that any voter other than Summers received the email, it is axiomatic that the Employer also failed to establish that anyone who received the email was a supervisee of Summers (assuming, once again, Summers was in fact a statutory supervisor).

department chairs. She also declined to adopt the Employer's unsupported conclusion that managers are necessarily supervisors or should, at least, be examined as if they were supervisors under Section 2(11) of the Act.[11] The Hearing Officer nevertheless examined the conduct of these individuals in the light most favorable to the Employer — she assumed for the purpose of her analysis that these individuals were supervisors, or managers who should be treated as supervisors. Viewed in that light, the Hearing Officer found that the pro-union conduct of these individuals did not interfere with employee free choice in the election. In examining this conduct, the Hearing Officer correctly applied the standard for analyzing supervisory prounion conduct enunciated in *Harborside Healthcare*, 343 NLRB 906 (2004); "whether supervisory prounion conduct 'reasonably tend [s]' to have a coercive effect on or [is] 'likely to impair' an employee's choice." She concluded that the conduct did not have a coercive effect on the voting unit and that it did not likely impair employee free choice

Once again, the Employer did not except to any of the Hearing Officer's findings of fact. It instead argued in its exceptions that the Hearing Officer erred in not accepting its unsupported conclusion that "'managerial employees' should be evaluated under the same analysis as statutory supervisors" in determining whether they interfered with employee free choice, by failing to find that department chairs are statutory supervisors, by failing to find that tenured and tenure-track faculty and department chairs materially affected the outcome of the election, by failing to find that Billy Summers' solicitation of union authorization cards was coercive, by failing to find that Summers' instruction to employees to vote yes in the election was coercive, and by finding that

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[11] Again, both the Hearing Officer and I reject the premise here — that Respondent's asserted managers should be viewed and treated as statutory supervisors under Section 2(11) of the Act. The Employer provided no legal support for its theory.

the Employer's anti-union campaign mitigated any coercive impact of the Petitioner's allegedly objectionable conduct.[12]

In finding that the Petitioner did not coerce employees by its conduct, I am mindful that the employees here are university faculty who are accustomed to "healthy and lively debate" with one another, and they at least observed and may have participated in that "healthy and lively debate" on the Employer's FacStaff listserv about the merits of union representation. The voters are well-educated and intellectually curious, work at a distinguished university with a vigorous academic program and are therefore people who are likely able to distinguish between simple campaigning and threats and coercion. Indeed, as discussed above, eligible voter Brandon Booker was "irritated" by his last encounter with an organizer for the Petitioner, but he nevertheless met with the organizer because, "honestly, I just wanted to see what information [the Petitioner] had."

Their status as well-educated and intellectually curious voters is not, however, determinative of the question whether the Petitioner coerced them by its campaign conduct. At bottom, the Employer simply failed to present evidence of any objectional conduct on the Petitioner's part. As to the solicitation of union authorization cards, the Employer paints this as similar to the in-person solicitations that the Board found troubling in *Harborside*. While I agree with the Hearing Officer in her patient discussion of why the Employer would not have coerced employees even if someone who is a statutory supervisor had sent the November 26 email encouraging employees to sign union authorization cards, there is no evidence here that a supervisor solicited authorization cards from a supervisee even under the Employer's construction of who among its faculty are statutory supervisors. The Petitioner, first of all, sent that email, not anyone the Employer would argue is a supervisor. As to the individuals who signed that email,

[12] Exceptions 12 through 18.

even if we accept that each and every one of them were statutory supervisors, the Employer utterly failed to establish that the Petitioner sent that email to any voter those "supervisors" supervised. The same is true of the other emails. I agree with the Hearing Officer that in each instance, the emails were simply run-of-the-mill campaign propaganda designed to persuade voters to support the Petitioner without any objective coercion. There were no threats and no *Harborside*-style solicitations by a supervisor of a supervisee to sign a union authorization card or to support the Petitioner.[13]

For these reasons, and those the Hearing Officer proffered, I agree with the Hearing Officer that Employer Objections 4 and 5 lack merit and are overruled.

***Employer's Exceptions Regarding Objection 6***

The Employer excepts to the Hearing Officer's recommendation to overrule Objection 6. In its Objection 6, the Employer contends that the Petitioner led voters to believe by a February 11, 2019 email that the National Labor Relations Board favored the Petitioner, that this

[13] Again, the only individuals the Employer proved as having received the November 26 email that referred to signing authorization cards are eligible voters Brandon Booker and Julie Swanner and their supervisors are not identified in that email.

However, as the Hearing Office found, even if there had been a supervisor identified in the November 26 email and evidence that the Petitioner sent to this email to eligible voters the purported supervisor supervised, it still falls short of the coercion that Board found troubling in *Harborside*. The email contained no authorization cards for the recipients to sign. The sender of the email, moreover, was the Petitioner, not the individuals identified as supporting the Petitioner in the email. Accordingly, even if a recipient responded to the email identifying his or her union sympathies, that response would go to the Petitioner, not those purported supervisors. Unlike the direct, face-to-face solicitations in *Harborside*, the purported supervisors are separated from the recipients by a virtual wall and there is no obvious way that the purported supervisors would know whether the recipients later signed a card or affirmatively declined to do so.

undermined the validity of the Board-conducted election, and resulted in lower voter participation in the representation election.

The February 11, 2019 email issued from the Petitioner's email account, info@seiufacultyforward.org. The email contained a link stating, "Can we count on you to vote yes for our union? If so, fill out this form and we'll make sure your ballot gets to you."[14] The Employer presented only one eligible voter, Julie Swanner, to testify that she received the email. The Employer did not establish by direct evidence that any other voter received the email. Swanner testified that she understood that emails from the info@seiufacultyforward.org were communications from the Petitioner. Swanner testified that when she received the email, she did not click on the link and questioned whether she would receive a ballot if she did not fill out the form (a form she did not review). According to Swanner, when she got the email, she discussed it via Facebook messenger with adjunct instructor in the School of Business David Hingham, an eligible voter. The Employer did not put the Facebook messenger exchange in the record and provided only Swanner's explanation of what that the message said. According to Swanner, she asked Hingham, "Does this mean, if I'm not going to vote yes, I'm not going to be sent a ballot?" Swanner reports that Hingham replied that he, too, received the email and the he, too, thought it was inappropriate.

Swanner also testified that she knew she was an eligible voter and knew about the mail-ballot election process from the Notice of Election and the Employer's website. On February 23, 2019, Swanner received a ballot from the National Labor Relations Board with enclosed instructions on how to vote.

[14] The link apparently was connected to a website maintained by the Petitioner. The Employer did not put the location the link led to into evidence.

The Hearing Officer concluded that the Employer established only that Swanner received the email, that the email was obviously from the Petitioner, and that the Petitioner did not tell voters or imply that only employees who supported the Petitioner would get ballots to vote in the election. The Hearing Officer noted that the voting unit consisted of well-educated academics who make their living through reasoning and that the statement in the email was not likely to engender confusion as to how employees would get to vote in the election. She further reasoned that, to the extent the email caused any confusion, the progression of the election process, with notices and instructions followed by mail ballots to all of the employees in the voting unit, would necessarily clarify for the recipients of the mail-ballot package, their right to vote.

The Employer excepts to the Hearing Officer's conclusion that the "Petitioner did not misrepresent the Board's processes or its relationship to the eligible voters." The Employer also excepts to the Hearing Officer's consideration that only one eligible voter testified about her interpretation of the email that only people who clicked the link would get their ballots. The Employer also contends in its exceptions that the Hearing Officer erred in finding that receipt of ballots in the mail clarified any confusion and dissipated the impact of the Petitioner's misrepresentation.[15]

I agree with the Hearing Officer's conclusion that the Employer established that only one eligible voter, Swanner, received the email. Even if I accept Swanner's description of a Facebook messenger exchange that the Employer did not put into the record as establishing that a second voter who did not testify, Hingham, also got the email, the Employer will have established that only two employees in a unit of 238 got that email. The vote spread in the election was 112 to 68 in favor of the Petitioner and thus any impact on the two voters would not have changed the

[15] Exceptions 19 through 22.

election result. In any event, I agree with the Hearing Officer that the email would not objectively lead voters to believe that they would not get to vote in the election if they did not support the Petitioner. That the email originated from the Petitioner, and not the Board, would tend to inform employees that the email was not an official National Labor Relations Board message on their right to vote and, as Swanner testified, the Employer's materials about the representation election assured her that she was an eligible voter.[16] The email expressly says only that if employees were to click on a link and fill out a form, the Petitioner would make sure they got a mail ballot; in other words, it would make sure that the National Labor Relations Board had the information necessary for the employee to get a ballot. I further agree with the Hearing Officer that, to the extent the email caused confusion among voters over whether they would get a ballot to vote in the election, actually getting that ballot from the Board necessarily dissipated that confusion. See *Riveredge Hospital*, 264 NLRB 1094, 1095 (1982).

Accordingly, I agree with the Hearing Officer that Objection 6 lacks merit.

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[16] The Employer did not put into evidence the Employer-created website to which Swanner testified. Given the Employer's decision not to put that website into evidence, I rely on Swanner's testimony that the website assured her that she was an eligible voter. This is consistent with the inference the Hearing Officer correctly drew, as discussed above in footnote 9, from the Employer's failure to ask a witness about an email. In each instance, we assume that the evidence the Employer failed to produce would have been adverse to the Employer had it properly submitted that evidence into the record.

While I find that this is an appropriate inference, it is not dispositive of the Objection. As discussed in the text, to the extent *any* voter erroneously believed from the email that one had to support the Petitioner to get a ballot, actually getting a ballot in the mail from the Board necessarily disposed of that confusion. And again, I agree with the Hearing Officer that the email objectively would not have confused the recipients *and* that the Employer established by its evidence only one eligible voter (and perhaps a second if I were to accept the hearsay statement of the second employee's confusion from the one witness the Employer produced) actually received that email in a unit of 238 employees.

***Conclusion***

Based on the above and having carefully reviewed the entire record, the Hearing Officer's Report on Objections, the Employer's exceptions, and the Petitioner's brief, I overrule Objections 1 and 3, and 4 through 6, and I certify the Petitioner as the representative of the appropriate bargaining unit.

## CERTIFICATION OF REPRESENTATIVE

**IT IS HEREBY CERTIFIED** that a majority of the valid ballots have been cast for SEIU Workers United Southern Region, and that it is the exclusive representative of all the employees in the following bargaining unit:

> **Including:** All limited term, visiting, and adjunct faculty employees at Elon University teaching at least one credit-bearing undergraduate course in the Employer's College of Arts and Sciences, School of Communications, School of Education, or Martha & Spencer Love School of Business.
>
> **Excluding:** All other employees, all tenured and tenure-track faculty, all continuing track faculty, all lecturing track faculty, all employees teaching online courses only, staff with faculty rank, all administrators (including those with teaching assignments), managers, and supervisors as defined by the Act.

## REQUEST FOR REVIEW

Pursuant to Section 102.69(c)(2) of the Board's Rules and Regulations, any party may file with the Board in Washington, DC, a request for review of this decision. The request for review must conform to the requirements of Sections 102.67(e) and (i)(1) of the Board's Rules and must be received by the Board in Washington, DC, by December 17, 2019. If no request for review is filed, the decision is final and shall have the same effect as if issued by the Board. A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the Request for Review should be

addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated September 3, 2019.

Scott C. Thompson, Acting Regional Director
National Labor Relations Board, Region 10
233 Peachtree Street, N.E., Suite 1000
Atlanta, Georgia 30303-2896